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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 415.

BENJAMIN HAWKER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE CITY AND COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JULY 14, 1897.

(16,628.)

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INDEX.

	Original.	Print
Clerk's certificate and return	1	1
Citation	2	1
Writ of error	3	1
Petition for writ of error	5	2
Assignment of errors	10	5
Clerk's certificate	13	5
Case on appeal to court of appeals	14	6
Remittitur from court of appeals	15	6
Notice of appeal to appellate division	19	7
Indictment	20	8
Demurrer	22	9
Order disallowing demurrer	23	9
Opinion of Fitzgerald, J.	24	19
Minute of conviction	25	10
Record of trial	27	11
Judge's charge	28	12
Motion for new trial	29	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1897.

	Original.	Print.
Certificate of reasonable doubt	30	13
Stipulation and order as to record	31	13
Clerk's certificate	32	13
Order of reversal	33	14
Notice of appeal to court of appeals	35	15
Opinion of appellate division	36	16
Dissenting opinion, Ingraham, J	43	20
Stipulation as to record	50	24
Order on remittitur	51	25
Clerk's certificate to bond	54	26
Bond	55	27

BLEED THROUGH POOR COPY

1 The return of the judges of the court of general sessions of the peace held in and for the city and county of New York.—A transcript of the indictment and judgment-roll of the court, together with all things touching or in anywise concerning the same.

We certify under the seal of our said court to the justices of the supreme court mentioned in the annexed writ filed in the clerk's office of this court on the first day of June, 1897.

By the court:

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL, *Clerk.*

2 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 26th day of June, one thousand eight hundred and ninety-seven, pursuant to a writ of error filed in the clerk's office of the court of general sessions of the peace in and for the city and county of New York, wherein Benjamin Hawker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Andrews, chief justice of the court of appeals of the State of New York, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

(Signed) CHAS. ANDREWS,
Chief Justice of the Court of Appeals of the State of New York.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of general sessions of the peace in and for the city and county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of general sessions of the peace in and for the city and county of New York, before you or some of you, being the court of law of the said State in which a judgment was had in the said city between The People of the State of New York and Benjamin Hawker, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Benjamin Hawker, as by his com-

plaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the
4 26th day of June next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court for the Southern District of New York.

Allowed by—
CHAS. ANDREWS,
Chief Justice of the Court of Appeals of the State of New York.

5 Court of Appeals of the State of New York.

Ex Parte BENJAMIN HAWKER, Petitioner.

Petition for writ of error requiring the court of general sessions of the peace in and for the city and county of New York, State of New York, to certify to the Supreme Court of the United States for its review and determination the case of The People of the State of New York against Benjamin Hawker.

To the honorable court of appeals of the State of New York:

The petition of Benjamin Hawker respectfully shows to this honorable court as follows:

I. That your petitioner is a citizen of the United States and of the State of New York, and is a physician by profession, residing and doing business in the city of New York.

II. That heretofore an act was passed by the legislature of the State of New York, and is now in force, entitled "The public health law," and known as Laws of 1893, chap. 661, as amended by Laws of 1895, chap. 398, and which provided, among other things, as follows:

SECTION 153. Any person who, * * * after conviction of a felony, shall attempt to practice medicine or shall so practice * * * shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars or imprisonment for six months for the first offence and on conviction of any subsequent offence, by a fine of not more than five hundred dollars or imprisonment for not less than one year, or by both fine and imprisonment.

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6 III. That your petitioner was indicted by the grand jury of the city and county of New York on or about the 30th day of April, 1896, being charged with having violated the aforesaid statute in having practiced medicine after conviction of a felony. Petitioner demurred to said indictment on the ground that the facts stated therein do not constitute a crime, in that the statute alleged to have been violated is prospective in its application, or else if it is not prospective in the application it is null and void, as being in violation of art. I, sec. 10, of the Constitution of the United States, and of the fifth and fourteenth (sec. I) amendments to said Constitution, and also of art. I, secs. I and VI, of the constitution of the State of New York. Said demurrer was disallowed by Fitzgerald, J., on the 23d day of July, 1896. On July 27th, 1896, petitioner pleaded not guilty, and on September 17th, 1896, he was tried before the Honorable James Fitzgerald and a jury and convicted. On the same day judgment was pronounced upon petitioner, and Judge Fitzgerald granted a certificate of reasonable doubt and admitted petitioner to bail pending this appeal. On the trial of petitioner no witnesses were examined. Petitioner admitted to be true all the facts alleged in the indictment on which he was tried and moved for a dismissal of the indictment, and that the jury be advised to acquit on the grounds already set forth in the above-mentioned demurrer. An appeal from said judgment of conviction was taken to the appellate division of the supreme court of the State of New York for the first department on February 5th, 1897, wherein said conviction was reversed, the indictment dismissed, and your petitioner discharged; that thereupon an appeal was taken by the people to the court of appeals of the State of New

7 York from said judgment of the appellate division of the supreme court, and there a decision was rendered on or about March 16th, 1897, by a divided court, reversing the judgment of the appellate division of the supreme court affirming the conviction and remitting the proceedings to the court of general sessions of the peace in and for the city and county of New York, there to be proceeded upon according to law; that the grounds on which petitioner appealed from the judgment of conviction herein is that chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, should be construed prospectively; that if construed retrospectively said statute is null and void, as being in conflict with the Constitution of the United States, in that it is in the nature of a bill of attainder, is an *ex post facto* law, deprives the defendant of liberty and property without due process of law, and compels the defendant to become a witness against himself. (See art. I, sec. 10, of the Constitution of the United States.)

IV. That a transcript of the record in this case from its commencement, duly certified under the seal of the clerk of the court of general sessions of the peace in and for the city and county of New York, is hereto annexed.

V. That your petitioner is advised by counsel and verily believes that this is a case provided for by sec. 709 of the Revised Statutes of the United States, in which the validity of a State statute is

drawn into question as being repugnant to the Constitution of the United States and to the rights guaranteed thereunder to citizens of the several States, and where a decision of the highest State court has been rendered in favor of said statute; that petitioner further says that it will be not only of great importance to him to
8 have the constitutional question involved in this case submitted for decision to the highest court in the land, but that a final decision of the matter there would settle the doubts now existing in the minds of the people of the State at large who are effected by the action of this law.

VI. Your petitioner therefore maintains that by the operation of the statute in question he is punished for an offence committed and atoned for many years before said statute was passed, and that he is deprived of liberty and property, as these terms are defined under the Constitution, in not being allowed to carry on a necessary and lawful occupation in a lawful manner.

Wherefore your petitioner prays that a writ of error may issue directed to the court of general sessions of the peace in and for the city and county of New York, to which court this case has been remitted by the New York court of appeals, requiring said court of general sessions to serve the said record to the Supreme Court of the United States, to the end that said case may be reviewed and determined by said Supreme Court, as provided by the Revised Statutes of the United States, and that said chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, may be declared unconstitutional, and that the judgment of conviction heretofore rendered against your petitioner under said law may be reversed, and for such other relief as to said honorable court may seem just.

And your petitioner will ever pray, &c.

HUGH O. PENTECOST,
Attorney for Petitioner, 346 Broadway, New York City.

9 STATE OF NEW YORK, } ss.:
City and County of New York, }

Benjamin Hawker, being duly sworn, says that he is the petitioner in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

BENJAMIN HAWKER.

Sworn to before me this 7th day of April, 1897.

SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

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10 The Court of Appeals of the State of New York.

In the Matter of the Petition of BENJAMIN HAWKER, Appellant.

Assignment of Errors.

Afterwards, to wit, on the — day of April, in the year of our Lord one thousand eight hundred and ninety-seven, at the April term for one thousand eight hundred and ninety-seven of the court of appeals of the State of New York, at the capitol, in the city of Albany, comes the said Benjamin Hawker, by Hugh O. Pentecost, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the facts stated in the indictment against the said Benjamin Hawker do not constitute a crime, for the reason that the statute alleged to have been violated is prospective in its application, or, if said statute is not prospective in its application, it is null and void as being in violation of art. I, sec. X, of the Constitution of the United States and of the fifth amendment to the said Constitution.

II.

That the court of appeals of the State of New York erred in not sustaining the judgment of the appellate division of the supreme court of the said State in reversing the judgment of the court of general sessions of the peace in and for the city and county of New York, in dismissing the indictment herein and in discharging the said Benjamin Hawker.

Wherefore the said Benjamin Hawker prays that the order of the said court of appeals of the State of New York be reversed, and that the said court of general sessions of the peace in and for the
11 city and county of New York be ordered to enter an order directing the dismissal of the indictment herein and the discharge of the said Benjamin Hawker from custody.

HUGH O. PENTECOST,
Attorney for Petitioner, 346 Broadway, New York City.

12 [Endorsed:] U. S. Supreme Court. The People against Benjamin Hawker. Writ of error, citation, petition, etc. Hugh O. Pentecost, att'y for petitioner, 1 Madison Ave., New York city. Filed June 1st, 1897.

[Endorsed:] Due and timely service of the within citation & writ of error is hereby acknowledged. William M. K. Olcott, district attorney, by C. J. Campbell. New York, June 1st, 1897. District attorney's office, received Jun- 1, 1897.

13 I, John F. Carroll, clerk of the court of general sessions of the peace held in and for the city and county of New York, do hereby certify that the annexed is a copy of the remittitur in the case of The People of the State of New York against Benjamin

Hawker, now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

Given under my hand and attested by the seal of the said court this tenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL.

3d vol. R. S., 5th ed., § 74, p. 687.

14 In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

Case on appeal.

W. M. K. Olcott, district attorney, for appellants, Criminal Court building, New York city.

Hugh O. Pentecost, attorney for respondent, 346 Broadway, New York city.

15 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 16th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, March 16th, 1897.

16 THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

Be it remembered that on the 27th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, The People of the State of New York, the appellants in this action, came here into court of appeals, by W. M. K. Olcott, their district attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court of the State of New York, and Benjamin Hawker, the respondent in said action, afterwards appeared in said court of appeals, by Hugh O. Pentecost, his attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

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17 Whereupon the said court of appeals, having heard this cause argued by Mr. John D. Lindsay, ass't district attorney, and Mr. Robert C. Taylor, of counsel for the appellants, and by Mr. Hugh O. Pentecost for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court in and for the first judicial department be, and the same hereby is, reversed, and that entered upon the conviction affirmed, and the proceedings remitted to the court of general sessions of the peace in and for the city and county of New York, there to be proceeded upon according to law.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the court of general sessions, there to be proceeded upon according to law.

18 Therefore it is considered that the said judgment be reversed, etc., as aforesaid.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the court of general sessions of the peace for the city and county of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said court of general sessions before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March 16th*, 1897.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] GORHAM PARKS, *Clerk.*

19 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &C.,
against
BENJAMIN HAWKER.

SIRS: Please take notice that the defendant herein hereby appeals to the appellate division of the supreme court, first department, from the judgment rendered against him in this court on the 17th day of September, 1896, and from the decision by Fitzgerald, J., filed on the 23d day of July, 1896, disallowing the demurrer herein.

Dated New York, September 18th, 1896.

HUGH O. PENTECOST,
Attorney for Defendant, Appellant,
346 Broadway, New York City.

To John F. Carroll, Esq., clerk of the court of general sessions; John R. Fellows, Esq., district attorney of the city and county of New York; Robert C. Taylor, Esq., counsel for the Medical Society of New York.

20 Court of General Sessions of the Peace of the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

The grand jury of the city and county of New York, by this indictment, accuse Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, of a misdemeanor, committed as follows:

Heretofore, to wit, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at a term of the court of sessions held in and for the county of Kings, at the court-house in the city of Brooklyn, before the Honorable Henry A. Moore, county judge of Kings county, and the Honorable Gilbert Wickham, and the Honorable Peter Pigott, justices of the sessions of the county of Kings, the said Benjamin Hawker, otherwise as aforesaid, having been theretofore indicted under the name of Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, for the crime and felony of abortion, for having, at the city of Brooklyn, in the county of Kings, on the first day of September, in the year of our Lord one thousand eight hundred and seventy-seven, with force of arms, unlawfully, wickedly, feloniously and willfully made an assault upon one Amelia Hyde, she, the said
21 Amelia Hyde, being then and there pregnant with child, and for having then and there feloniously and willfully used and employed upon the body of her, the said Amelia Hyde, a certain instrument, which he then and there had and held, with intent then and there feloniously and willfully to produce the miscarriage of her, the said Amelia Hyde, and whereby he did then and there willfully and feloniously produce the miscarriage of her, the said Amelia Hyde, the same not being then and there necessary to preserve the life of her, the said Amelia Hyde, or that of such child, by means whereof the miscarriage of her, the said Amelia Hyde, was procured and the death of the said child produced; and having been duly arraigned in the said court upon the said indictment, and having pleaded not guilty thereto, and having been duly tried and convicted, was, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at the said term of the said court of sessions held in and for the county of Kings, at the court-house in the city of Brooklyn, duly sentenced and adjudged by the said court of sessions to be imprisoned in the penitentiary of the county of Kings for the term of ten years.

And he, the said Benjamin Hawker, otherwise as aforesaid, having been so as aforesaid convicted of the said crime and felony of abortion, as aforesaid, afterwards to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and ninety-six, at the city of New York and county of New York aforesaid, unlawfully did practice medicine by then and there un-

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lawfully medically examining, treating and prescribing for one Dora Hoenig, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

JOHN R. FELLOWS,
District Attorney.

22 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, ETC.,
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

The defendant, Benjamin Hawker, above named demurs to the indictments presented by the grand jury on the 30th day of April, 1896, charging him with violating chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, in having practiced medicine after conviction of a felony, on the following ground:

That the facts stated in said indictment do not constitute a crime, in that the statute alleged to have been violated is prospective in its application, or if it is not prospective in its application it is null and void as being in violation of art. 1, sec. 10 of the Constitution of the United States, and of the 5th amendment to said Constitution, and also of art. 1, secs. 1 and 6 of the constitution of the State of New York.

Dated New York, April 7th, 1896.

HUGH O. PENTECOST,
Defendant's Attorney, 346 Broadway, N. Y. City.

23 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &C.,
against
BENJAMIN HAWKER, Otherwise Called Benjamin W. Hawker, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

On Indictment, Misdemeanor, Violation of Chap. 661, Laws of 1893, as Amended by Chap. 398, Laws of 1895. Filed April 30, 1896.

A demurrer having been heretofore filed to this indictment, and counsel having been heard thereon, it is considered by the court, and ordered and adjudged that the said demurrer be, and the same hereby is, disallowed, with leave to the defendant to plead over. (See opinion filed this day.)

Dated July 23, 1896.

24 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c., *against* BENJAMIN HAWKER. } Violation of Chapter 661 of Laws of 1893 as Amended by Chapter 398, Laws of 1895.

Appearances: Geo. Gordon Battle and Robert C. Taylor, Esqs., for the People, and Hugh O. Pentecost, Esq., for the defendant.

FITZGERALD, *J.*:

Proof of the facts alleged in this indictment would clearly establish a violation of the statute, and subject the defendant to the penalties therein provided.

The defendant contends that the act is unconstitutional.

There are some grave questions involved in the discussion of this point, but where the affirmative of the proposition of the unconstitutionality of a law is not conclusively established by binding precedent the orderly administration of public justice requires that a trial court should resolve the question in favor of the law.

Applying this rule to the pending issue, the demurrer interposed must be disallowed, with leave to defendant to plead over.

Dated July 23, 1896.

25 At a court of general sessions of the peace, holden in and for the city and county of New York, at the city hall of the said city, on Thursday, the 17th day of September, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable James Fitzgerald, judge of said court of the city of New York, justice of the sessions.

Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, is in due form of law arraigned at the bar upon an indictment for a misdemeanor, and having heard the indictment read and being asked whether he demanded a trial thereon, answers that he does require a trial, and says that he is not guilty thereof.

Whereupon the following jury is balloted and sworn to well and truly try and a true verdict give according to evidence, viz: Charles Hirsch, Peter J. Koelble, Thomas F. Gaynor, Charles Tisch, Joseph Stephens, John H. Irwin, Linden D. Stevens, Ernest Young, Jr., John Wild, Warren Marcus, Frank L. Latham, Murray H. Strong, who upon their oath aforesaid do say that the said defendant is guilty of the misdemeanor as by the indictment is alleged against him.

Counsel for defendant moves for a new trial and an arrest of judgment on various grounds.

After hearing counsel thereon the court denies the motions.

The defendant is arraigned at the bar.

The district attorney moves for judgment against the defendant.

It is thereupon demanded of the said defendant what he hath to say why judgment should not be pronounced against him accord-

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ing to law, who nothing further saith unless as before he hath said.

26 Whereupon it is ordered and adjudged by the court that the said Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, for the misdemeanor aforesaid, whereof he is convicted, pay a fine of two hundred and fifty dollars.

And it is further ordered that in default of the payment of said fine he stand committed to the custody of the warden of the city prison of the city of New York until the same be paid, not exceeding one day for each dollar of the fine imposed.

A true extract from the minutes.

JOHN F. CARROLL,
Clerk of Court.

27 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
BENJAMIN HAWKER, alias BENJAMIN W. HAWKER, alias BENJAMIN PERRY, alias BENJAMIN WEST.

Indicted for a misdemeanor.

Indictment filed 30th of April, 1896.

Tried before the Hon. James Fitzgerald, judge, and a jury, on the 17th day of September, 1896.

Appearances: George Gordon Battle, Esq., for the People; Hugh O. Pentecost, Esq., for the defendant.

(Jury impaneled.)

Mr. BATTLE: This defendant was indicted for a misdemeanor under chapter 398, section 153, of the Laws of 1895, known as a public health law. He is charged in this indictment with having practiced medicine on the 22d day of February, 1896, having been theretofore convicted of a felony, the felony consisting of the crime of abortion, for which he was convicted, in 1878, in the county of Kings.

To this indictment counsel for the defendant interposed a demurrer, upon the ground that the law was unconstitutional. The demurrer has been overruled by the court, and the case now comes up for trial. The facts will be conceded by defendant's counsel.

28 Mr. PENTECOST: The defendant concedes all the facts set forth in the indictment to be true.

I move the court to advise the jury to acquit, and that the indictment herein be dismissed, upon the ground that the facts set forth in said indictment do not constitute a crime, as hereinbefore set forth in the arguments heard before your honor in support of the demurrer heretofore interposed.

The COURT: The facts stated in the indictment. You concede the facts in this case as claimed by the district attorney, and you

make the further concession that they are to be considered by the court and jury as though they were facts testified to by witnesses on the stand?

Mr. PENTECOST: Yes.

The COURT: Motion denied.

Mr. PENTECOST: I except.

The Court's Charge.

GENTLEMEN OF THE JURY: It is charged in this indictment that the defendant violated the law. The facts alleged in the indictment, as constituting that violation of the law, are all conceded by the defense. The defendant interposed a legal defense, which was a matter for the court to pass upon, and the court has passed upon that adversely to him.

All questions of fact under our law must be passed upon by a jury. Therefore the facts in this case, even though they are conceded, must be submitted to you.

The charge in the indictment is that the defendant, after having been convicted of a felony, practiced medicine, and the defense concede that to be so, and say they are willing that you should so consider it in the same manner as if witnesses had been called and testified before you that they had visited the defendant's office, had been treated by him and paid him a fee, and then, subse-
29 quently, if it were shown that the defendant had been convicted of a felony, the crime is made out, as charged.

It is conceded that he has been heretofore convicted of a felony, as alleged.

All the facts charged are conceded, and if you believe them to be true, you will convict the defendant. If you entertain a reasonable doubt of his guilt, you will acquit him.

Your verdict will be either guilty or not guilty, as charged in the indictment.

The jury rendered a verdict of guilty.

The defendant moves the court for a new trial upon all the grounds set up by the exceptions taken at the trial, and on the further ground that the verdict was contrary to law. And the defendant further moves for an arrest of judgment on the ground that the facts stated in the indictment herein do not constitute a crime.

Motion denied. Defendant excepts.

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30 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, James Fitzgerald, judge of the court of general sessions of the peace in and for the city and county of New York, who presided at the trial of Benjamin Hawker, the above-named defendant, on an indictment charging the said Benjamin Hawker with a misdemeanor in violating chapter 661 of the Laws of 1893, as amended by chapter 398 of the Laws of 1895, namely, by having practiced medicine after conviction of a felony, and who was convicted of said crime by a jury on said trial, on the 17th day of September, 1896, do hereby certify that, in my opinion, there is reasonable doubt whether the said judgment should stand.

Dated at New York this 17th day of September, 1896.

JAMES FITZGERALD,
Judge of the Court of General Sessions.

31 New York Supreme Court, Appellate Division, First Department.

THE PEOPLE, ETC.,
against
BENJAMIN HAWKER.

It is hereby stipulated and agreed, that the foregoing record shall be taken and deemed to be the complete and correct copy of the case on appeal and bill of exceptions herein, and that the said record comprises all material testimony herein, and that the printed case may be filed as the original.

Dated New York, ——, 1896.

JOHN R. FELLOWS,
District Attorney, Attorney for the Respondents.

HUGH O. PENTECOST,
Attorney for the Appellant.

On the foregoing stipulation, it is ordered that the foregoing printed case be filed as the original.

Dated New York, ——, 1896.

JAMES FITZGERALD,
Judge of the Court of General Sessions.

32 I, John F. Carroll, clerk of the court of general sessions of the peace held in and for the city and county of New York, do hereby certify that the foregoing is a copy of the notice of appeal

and of the judgment-roll in the case of The People against Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, convicted by a jury of a misdemeanor, now on file in the clerk's office of said court of general sessions, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said
[L. S.] court this — day of November, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN F. CARROLL.

Secs. 485, 532 and 517, Code Criminal Pro.

33 At a term of the appellate division of the supreme court of the State of New York, in and for the first judicial department, held at the court-house of the said appellate division in the city of New York, on the 5th day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Hon. Charles H. Van Brunt, P. J.
Hon. Pardon C. Williams,
Hon. Edward Patterson,
Hon. Morgan J. O'Brien,
Hon. George L. Ingraham, } JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,
against
BENJAMIN HAWKER, Appellant. } Order of Reversal.

The above-named appellant having been, at a court of general sessions held in and for the city and county of New York at the criminal court building in said city, on the seventeenth day of September, in the year of our Lord one thousand eight hundred and ninety-six, convicted of a misdemeanor, to wit, a violation of section 153 of the public health law, whereupon it was considered by the said court, and ordered and adjudged, that the said appellant, for the felony aforesaid whereof he was so convicted as aforesaid, pay a fine of two hundred and fifty dollars;

And the appellant aforesaid, having thereafter duly appealed from the said judgment to this court, and the said appeal having come on to be heard in due form of law, and the return herein being now before this court, and having been by this court duly in-
34 spected, upon which inspection it has and doth now appear to this court that the court below erred in overruling the demurrer to the indictment, and that certain errors of law were committed upon the trial of the above-named appellant, and this court upon such examination and inspection of the said return, and the facts herein there represented, having exercised its discretion, and having refused a new trial upon the facts herein, and having also refused a new trial upon the ground that the verdict was against the weight of the evidence:

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Now, therefore, after hearing Hugh O. Pentecost, Esquire, of counsel for the appellant, and Robert C. Taylor, Esquire, of counsel for the respondents, due deliberation being had thereon, it is—

Ordered and adjudged, that for the errors of law aforesaid, so found in said return, and not for errors of fact, nor as a matter of discretion, the said judgment, so appealed from as aforesaid, be and the same hereby is in all things reversed, and that the indictment against the appellant be dismissed and the appellant discharged; and it is further

Ordered, that the proceedings herein be and the same are hereby remitted to the said court of general sessions, there to be proceeded upon according to law.

Ent.

C. H. V. B., *P. J.*

Indorsed: Filed February 10, 1897. Alfred Wagstaff, clerk appellate division. A copy. Alfred Wagstaff, clerk appellate division.

35 New York Supreme Court, Appellate Division, First Department.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

SIRS: Please take notice that the People of the State of New York hereby appeal to the court of appeals from the judgment rendered herein on the 5th day of February, 1897, reversing the judgment of the court of general sessions of the peace of the city and county of New York rendered against the respondent on the 17th day of September, 1896, on his conviction in said court of a violation of the public health law, dismissing the indictment against the respondent and discharging him from said judgment of conviction, and from each and every part of the said judgment of reversal.

Dated New York city, February 11, 1897.

W. M. K. OLCOTT,
District Attorney.

To Hugh O. Pentecost, Esq., attorney for the respondent, No. 346 Broadway, New York city; Henry D. Purroy, Esq., county clerk, etc., New York city; John F. Carroll, Esq., clerk of said court of general sessions, New York city.

36 Supreme Court, Appellate Division, First Department.

Present: Hon. Charles H. Van Brunt, P. J.
Hon. Pardon C. Williams,
Hon. Edward Patterson,
Hon. Morgan J. O'Brien,
Hon. George L. Ingraham. } JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
vs.
BENJAMIN HAWKER, Appellant.

Appeal from judgment of the court of general sessions, September 17, 1897, Hon. James Fitzgerald, presiding, convicting defendant of misdemeanor, and from judgment overruling a demurrer. Reversed.

Argued December 16, 1896. Decided February 5, 1897. Reported appellate division.

Mr. Hugh O. Pentecost, for appellant; Mr. Robert C. Taylor, for respondent.

PATTERSON, *J.:*

The appellant was indicted in the court of general sessions of the peace for a misdemeanor charged to have been committed by violating that provision of section 153 of the public health law (chapter 661, Laws 1893, as amended by chapter 398, Laws 1895), which enacts, among other things, that any person who after conviction of a felony shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor. It is alleged in the indictment that the appellant was convicted in March, 1878, of a felony and was sentenced to a term of imprisonment, notwithstanding which,
37 and contrary to the act of 1893, as amended in 1895, he did practice medicine in the city of New York on the 22d day of February, 1896. A demurrer was interposed to the indictment on the ground that the provision of the statute sought to be enforced against the prisoner is unconstitutional. The demurrer was overruled. On his arraignment for trial, the defendant admitted on the record that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed, but its execution was suspended and a certificate of reasonable doubt was given, in order that the question of law involved might be passed upon by the appellate courts. That question is now brought up by appeal from the judgment and from the order overruling the demurrer, and, stated in its simplest form, it is, whether the legislation of 1893 and 1895, in so far as it relates to convictions had prior to that statute taking effect, is a lawful exercise of the police power of the State or is an *ex post facto* law, or one in the nature of a bill of attainder or a bill of pains and penalties, and thus included in the powers the exercise of which is forbidden to the several States of the Union by subdivision 1 of section 10 of the Constitution of the United States.

It is not, and in reason cannot be, denied that that function of

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government called the police power of the State extends to the regulation, control and supervision of all matters relating to the public health, or that legislation upon such subjects is entirely within the jurisdiction of the several States. As affecting public health, each State has the absolute right to make such appropriate and constitutional laws as it may deem proper relating to the conditions upon which any person will be allowed to practice medicine or surgery within its territorial limits. That power is not confined merely to dictating conditions or requiring qualifications applicable to the acquisition of an original right or permission to practice, but it includes also the authority to prescribe new conditions as the necessity for them may arise, upon which one practicing the healing art may continue in the pursuit of his profession. As is said in
38 Dent *vs.* West Virginia, 129 U. S., 114, the same reasons that control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance may call for further conditions as a requirement of his continuance in practice. All legislation exclusively directed to the accomplishment of that object comes within the police power of the State. Therefore, in its operation upon those convicted of felony after its passage, the provision of the public health law now under consideration is constitutional and valid, for it declares in advance that whosoever shall thereafter be convicted of a felony shall not be allowed to continue in the practice of medicine, and the additional punishment for crime is announced before the crime is committed. But with respect to those who had acquired the right to practice and may have been convicted before the act of 1893, the question is presented in an entirely different aspect. As was said by Mr. Justice McLean in the alien passenger cases (7 How., U. S., 408), "the police power of the State cannot draw within its jurisdiction objects which lie beyond it."

"In guarding the safety, the health and morals of its citizens a State is restricted to appropriate and constitutional means." Assuming, for the purpose of the argument, that the legislature may require for the continuance in the practice of medicine that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the terms of the act. The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a past offense, and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies—not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of practicing at all. Clearly it
39 acts directly upon and enhances the punishment of the antecedently committed offense by depriving the person of his property and right and preventing his earning his livelihood in his

profession, only because of his past, and in this case expiated offense against the criminal law. This prisoner has committed no new crime, except that which the statute has created out of the old one. He had absolutely the right to practice medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away from his property in the right to earn his living on the expiration of his imprisonment by engaging in the profession of which he was and is a member. His civil rights were not extinguished but only suspended during his imprisonment (2 R. S., p. 701, sec. 19; Penal Code, sec. 710). That his right to so engage in that profession is in the nature of a property right cannot be disputed. It is not a mere revocable license. As is said in the Dent case (*supra*), in this country "all vocations are open to every one on like conditions. All may be pursued as a means of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate in them, *that is, the right to continue their prosecution,* is often of great value to the possessors *and cannot be arbitrarily taken from them any more than their real or personal property can be thus taken.*" That means that if it is taken away it must be for cause. It was held in that case that there is no arbitrary taking away of the right where its exercise is not permitted for failure to comply with conditions imposed by the State for the protection and welfare of the people, and hence a law requiring practitioners of medicine under certain circumstances to procure evidence of their fitness to continue in practice was a valid exercise of legislative power and a conviction for practicing without such evidence was sustained. The authority of the Dent case is invoked here as being conclusive upon the validity of the law under which this appellant was indicted, but the distinction between that case and this is broad and striking. No question arose there of the construction of a new crime out of an old one, nor the taking away by legislation of a right because of the previous commission of an offense. It was the mere regulation of the right.

All that the statute of West Virginia required related to physicians habitually practicing in that State furnishing themselves with evidence of their qualifications to continue in the pursuit of a calling, and making it a misdemeanor to practice without that evidence. The court was very careful to point out the difference between it and that other class of cases in which laws were "designed to deprive parties of their rights to continue in their profession for past acts." In the Dent case the statute applied to every person, without exception, practicing in the State of West Virginia and related directly to fixing a then present status as to the qualifications of every physician in the State. Conceding, but not deciding, that the legislature may require as a condition for continuing in the practice of medicine that every practitioner shall be possessed of and continue to have a good moral character, that requirement would refer to some present qualification to be ascertained by conditions existing at the time the enforcement of the requirement was sought. Con-

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viction of a felony certainly raises a presumption of bad character—but it is not an irrebuttable presumption that a man convicted of an infamous crime, "treason, felony or the *crimen falsi*," ten or twenty or fifty years ago is today absolutely an immoral person unfit to practice any profession. There is no such conclusive presumption. Even as to the competency of witnesses, the old rule of disqualification of convicts is completely done away with in the State of New York (Code Civ. Proc., sec. 832). The provision of the statute we are now considering does not take hold of an existing condition of moral character. That may be never so good and yet the new crime exists, arising exclusively out of a past transgression. It is said that the legislature has only made the former conviction evidence of a disqualification which it had the power to impose—but that is not so. It makes the prior conviction, which is but the establishment by adjudication that a crime
41 was committed, the very essence of the newly created crime.

The design of the act is, therefore, fully apparent. No matter how praiseworthy the motive may be, it is meant to deprive one class of persons otherwise lawfully engaged in the exercise of a right, of that right, because of past occurrences "many of which are in nowise associated with their professional pursuits," for this act strikes at the unfortunate man who in his youth may have violated the law, and without real evil intent have committed and been convicted of any felony and pardoned the very day of his conviction, as well as the hardened criminal, guilty of as foul an offense as that of which this appellant was convicted. The underlying purpose of the act may be to purge the medical profession of members unworthy of confidence, but the real effect is to accomplish that by inflicting an additional punishment through a newly created offense inseparably connected with the anterior crime, and thus bring about a result the Constitution forbids, no matter in what form the statute is drawn. The distinction between the two classes of cases runs through the leading authorities on the subject. It is plainly pointed out in the Garland case (4 Wallace, 333). In the opinion of the court in that case it is declared that "exclusion from any of the professions or any of the ordinary avocations of life *for past conduct* can be regarded in no other light than as punishment for such conduct," and it was held that laws of that character come within the constitutional inhibition. Not only is this defendant punished by exclusion from his profession, but he is to suffer fine and imprisonment also. That fine and imprisonment may be said to be punishment for violating the new law, but the exclusion from the profession under pains and penalties for continuing in its practice is only because of the previous crime, and hence additional punishment for that crime. The chief arguments to be urged in favor of the constitutionality of this law are very powerfully advanced by Mr. Justice Miller in the minority opinion in the Garland case, and they are to a great extent the same general considerations
42 relied upon by the people in the case at bar. And so in the Utah election cases (Murphy *vs.* Ramsey and four other cases, 114 U. S., 14) the question related to the validity of an act of the

Congress operating the disfranchisement of voters in the Territory of Utah who were bigamists or polygamists. The act was declared constitutional because it operated upon the present status of voters then having a plurality of wives. The disfranchisement was not because the person had committed bigamy or polygamy, but because he persisted in crime by continuing in the criminal or forbidden relation in violation of a statute. No additional punishment was added to a past crime. In the case at bar, as before remarked, the real substance of the present misdemeanor is created from the past offense.

Our conclusions, therefore, are: 1st. That the provision we have considered of the public health law *is constitutional* so far as it operates prospectively and upon persons convicted of felony after its passage. 2d. That it *is unconstitutional* in so far as it applies by its terms to persons so convicted before the law went into operation.

The judgment and order appealed from must be reversed, the indictment dismissed and the appellant discharged.

Van Brunt, P. J., Williams and O'Brien, JJ., concur.

43 Supreme Court, Appellate Division, First Department, January, 1897.

Charles H. Van Brunt, P. J.
Pardon C. Williams, }
Edward Patterson, } JJ.
Morgan J. O'Brien, }
George L. Ingraham, }

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, } No. 910.
vs.
BENJAMIN HAWKER, Appellant.

Appeal from judgment of the court of general sessions convicting defendant of misdemeanor, and from judgment overruling demurrer.

Mr. Hugh O. Pentecost, for the appellant; Mr. Robert C. Taylor, for the respondent.

INGRAHAM, *J.:*

I cannot agree with Mr. Justice Patterson. The question, as he states it, is whether the provision of section 153 of the public health law, chapter 661 of the Laws of 1893, in so far as it relates to convictions had prior to that statute taking effect, is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder or a bill of pains and penalties, and thus included in the powers the exercise of which is forbidden to the several States of the Union by subdivision 1 of section 10 of the Constitution of the United States. It is not pointed out in the prevailing opinion whether the provision in question is an *ex post facto* law or one in the nature of a bill of attainder or a
44 bill of pains and penalties; but in the opinion the act is assumed to be valid unless it is in violation of this provision

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of the Federal Constitution. It is now too late to question the right of the State to make the regulations necessary for the preservation of the public health; and, although the exercise of that power must necessarily involve some restraint in the liberty of the individual, or in his right to pursue a particular avocation, dependent upon the condition of affairs at the time of the exercise of the power, still where the court can see that the methods adopted have a reasonable connection with the preservation of the public health, I do not understand that they are necessarily *ex post facto* because rights of the individual that existed prior to the passage of the law that creates the restriction are curtailed. I suppose that if an act was passed requiring that those having a contagious or infectious disease should be isolated so as to avoid communicating the disease, the fact that such disease existed prior to the time of the passage of the act would not make the fact *ex post facto*, and so unconstitutional, nor would such isolation or control over a person who has such a disease be a punishment for having the disease; and so as to the power of the State to regulate the practice of those professions that have to do with the public health, and to determine who shall practice such professions within the State, and what qualifications they shall possess, has been recognized as being within the power of the State by a long series of legislative acts and by the decisions of the highest courts of this State and of the United States. The question was directly presented to the Supreme Court of the United States in the case of Dent *vs.* West Virginia (129 U. S., 114). It was there expressly held that an act of the legislature of the State of West Virginia prohibiting a person from practicing medicine unless such person had a degree of a recognized medical college, had passed an examination, or had practiced medicine in the State for at least ten years prior to the passage of the act, was a valid exercise of this power by the State; and the conviction of a person who had practiced but five years prior to the passage of the act was upheld. The legislature has provided a test which would regulate the practice of all those who in the future should practice medicine within the State, and prohibiting those who had not the required qualifications from practicing. That prohibition applied to one who had practiced for five years prior to the passage of the act and who was practicing at the time of its passage. The number of years in practice was the test there prescribed. It was a purely arbitrary one fixed by the legislature, and yet it was upheld as a valid exercise of this power. Once concede that the legislature had the power to prescribe the qualifications, and the methods by which those qualifications could be ascertained, it is difficult to see how the courts can interfere so long as the test prescribed has a relation to the qualifications required. It must also, I think, be conceded that; considering the relation that a physician bears to his patient and the acts that he is often required to do, which may or may not be criminal, depending upon the *bona fide* belief of the physician that they are necessary for the protection of the life and health of the patient, the character of the physician is an important element in determining whether he possesses the

necessary qualifications for the practice of his profession. The question, it seems to me, is whether the provisions of the statute which require that certain qualifications are required before an individual be allowed to practice the profession of medicine, and the test adopted to ascertain whether a physician assuming to practice has such qualifications, are, under the circumstances, reasonable. By the public health law, chapter 661 of the Laws of 1893, the State has attempted to prescribe general rules for the protection of the public health. This act provides for a State board of health and for local boards; prohibits the adulteration of food, drugs and medicine; relates to contagious and infectious diseases, their suppression and treatment; regulates the practice of medicine and dentistry and subjects relating thereto. By article 8 the practice of medicine in the State of New York is regulated, and by section 140 of the act the qualifications of those practicing medicine within the State are prescribed. It is there provided that no person
46 shall practice medicine after September 1, 1891, unless previously registered and legally authorized. "Nor shall any person practice medicine who has ever been convicted of a felony by any court, or whose authority to practice is suspended or revoked by the regents on recommendation of a State board." Provision is then made for the examination of candidates to practice medicine, and the qualifications that must be shown before a license to practice is granted. Then by section 153 of the act it is provided that "Any person who, * * * after conviction of a felony, shall attempt to practice medicine, or shall so practice * * * shall be guilty of a misdemeanor;" and it was for a violation of this section that the defendant was convicted. It appeared on the trial that this defendant had been convicted in the year 1878 of the crime of abortion. So, when this act took effect, he was not a person qualified to practice medicine under section 140, and by so practicing after the 1st of September, 1891, he was guilty of a violation of the act. He was convicted of practicing medicine in the city and county of New York in February, 1896. The act, therefore, did not make him guilty of an offense committed before the passage of the act. It was the act of practicing medicine when he was not, under the provisions of section 140 of the statute referred to, qualified to practice within this State that constituted the offense. The only question is whether the legislature had the power to require, as one of the qualifications of a physician, that he should be a man of good moral character, and that the fact that he had been convicted of a felony should be conclusive that he was not of such a character as would justify his being allowed to practice. If it is conceded that the legislature had the power to prescribe qualifications for those in practice at the time of the passage of the act, which would exclude some who were then practicing, and that a man of bad character should not be allowed to practice, upon what principle can it be said that it was beyond the power of the legislature to declare that a conviction of a felony should be evidence of the lack of the necessary quali-

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fications to entitle the person convicted to be allowed to
47 practice? In Dent *vs.* West Virginia (*supra*) the fact that a physician had practiced ten years prior to the passage of the act was evidence that he had the qualifications required, while the practice of nine years was not such evidence. Here the legislature has said that the fact that a person has been convicted of a felony shall prohibit him from practicing, not as an additional punishment, or as any punishment, for the offense for which he had been convicted, but as a test of his qualification. Was not the physician who had practiced five years in the case of Dent *vs.* West Virginia (*supra*) as much punished because of the fact that he had practiced less than ten years as was the defendant in this case punished because he had, prior to the time of the passage of the act, been convicted of a felony? In both cases the legislature had prohibited the defendant from practicing, and had provided that in case he should violate the provisions of the law and practice without the qualifications prescribed he should be guilty of a crime. The legislature having, concededly, the power to determine what should be the qualifications, and what tests should be applied to determine whether such qualifications existed, I cannot see how the court can say that where a test which provides that a ten years' practice is evidence of such qualification, and is valid, but that a test which provides that a conviction of a felony shows that the necessary qualifications did not exist is void. An examination of this whole act shows that it relates solely to the regulation of the public health, and not to the punishment of any one for any offense except for a violation of its provisions subsequent to the passage of the act; and when this defendant, in the face of this prohibition of the statute, practiced medicine within this State, he was guilty of a crime unless the prior conviction of a felony had no reasonable connection with the qualification, mental or moral, of those who should practice medicine.

The extremely interesting discussion of the question as to what is an *ex post facto* law in the case of Cummings *vs.* State of Mis-
48 souri (4 Wall., 277) and *Ex parte* Garland (*id.*, 334) does not seem to me to be applicable here.

In *Ex parte* Garland, Mr. Justice Field, in delivering the opinion of the court, at page 379, says: "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment against the prohibition of the Constitution." Applying this test, an examination of the act conclusively shows that this power has not been used here as a means for the infliction of punishment at all, but solely to prescribe the qualifications of a person practicing medicine within this State. The constitution of the State of Missouri in Cummings *vs.* State of Missouri (*supra*) and the act of the United States in *Ex parte* Garland (*supra*) were both held to be intended to inflict penalties for acts committed prior to the adoption of the constitution in one case and

the passage of the act of Congress in the other; and thus were held to be *ex post facto* laws and within the prohibition of the Constitution. Mr. Justice Field, who delivered the opinion of the court in the Cummings and Garland cases, speaking for the court in the case of Dent *vs.* West Virginia (*supra*), says of the first-named cases, "The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for the past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence these receiving a license under authority of the State." It seems to me that this applies to the case at bar.

49 Attention is called in the prevailing opinion to the fact that "this act strikes at the unfortunate man who in his youth may have violated the law and without real evil intent have committed and been convicted of any felony and pardoned the very day of his conviction as well as the hardened criminal guilty of as foul an offense as that of which this appellant was convicted." This suggestion is only attacking the propriety of the test which the legislature has established to determine whether or not the moral qualifications exist; and it might as well be said that the test provided for in Dent *vs.* West Virginia (*supra*) was not a perfect test, because a practice of five years in a large city would better qualify a person for the practice of medicine than a ten years' practice in a country district. It was for the legislature to establish the test, and as long as it had a reasonable connection with the object sought to be attained—that is, the qualification of the physician—its discretion is not subject to review. It certainly seems to me to be a not unreasonable test of the moral qualification of a man who is to be admitted to the intimate relation that must exist between a patient and a physician, that it should not appear by his past life that he had been guilty of a serious crime. As was stated by the court of appeals in the case of People *vs.* Havnor (149 N. Y., 201), "When thus exercised, even if the effect is to interfere to some extent with the use of the property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of the property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights."

I think the legislature had the power to say that a person who had been convicted of a felony did not have the necessary qualifications to practice medicine within this State, and that, therefore, the judgment should be affirmed.

50 *Stipulation.*

It is hereby stipulated that the foregoing are true and correct copies of the notice of appeal, the order and judgment appealed from and the papers on which the court below acted in making said

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order and judgment, and of the whole thereof, and of the opinion of the appellate division herein, and certification thereof is hereby waived.

Dated New York, February 25, 1897.

W. M. K. OLCOTT,
District Attorney, Attorney for the Appellants.
HUGH O. PENTECOST,
Attorney for the Respondents.

51 Court of General Sessions of the Peace, City and County of New York.

JUNE 22ND, 1897.

I certify that the annexed is a copy of an order now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of said original.

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL,
Clerk of Court.

At a term of the court of general sessions of the peace held in and for the city and county of New York, at the building for criminal courts, in the city of New York, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: —— ——.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants, *against* BENJAMIN HAWKER, Respondent. } Order on Remittitur.

Whereas heretofore, to wit, at a term of the court of general sessions of the peace in and for the city and county of New York, held at the criminal court building, in said city, on the seventeenth day of September, 1896, the above-named respondent was in due form of law convicted by the verdict of a jury of a misdemeanor, to wit, of practicing medicine after conviction of a felony, whereupon, to wit, on the said seventeenth day of September, 1896, it was considered by the said court and ordered and adjudged that the said respondent, for the misdemeanor aforesaid, whereof he was so convicted as aforesaid, should pay a fine of two hundred and fifty dollars, and that, in default of the payment of said fine, he should stand committed to the custody of the warden of the city prison of the city of New York until the same should be paid, not exceeding one day for each dollar of the fine imposed;

And whereas the respondent aforesaid thereafter duly appealed from the said judgment to the appellate division of the supreme court of the State of New York for the first department;

And whereas, at a term of the appellate division of the said supreme court, held in and for the first department, to wit, at the court-house thereof, in the city of New York, on the fifth day of February, in the year of our Lord one thousand eight hundred and ninety-seven, the said judgment of this court was by the judgment of the said appellate division, for errors of law and not for errors of fact, nor as a matter of discretion, in all things reversed;

And whereas the appellant aforesaid thereafter duly appealed from the judgment of the said appellate division to the court of appeals of the State of New York;

52 And whereas, at a term of the said court of appeals, held at the capitol, in the city of Albany, on the sixteenth day of March, in the year of our Lord on- thousand eight hundred and ninety-seven, the said judgment of the said appellate division was by the judgment of the said court of appeals in all things reversed and the judgment entered upon the conviction affirmed and the record herein and the proceedings in the said last-mentioned court upon the said appeal were by the said judgment remitted to this court, there to be proceeded upon according to law, as by the remittitur of the said court of appeals now on file in this court more fully appears:

Now, therefore, on reading and filing the said remittitur, and on motion of W. M. K. Olcott, Esquire, district attorney, it is—

Ordered that the said judgment of the said court of appeals be, and the same is hereby, made the judgment of this court; and it is further

Ordered that the said judgment of this court so appealed from as aforesaid and so affirmed be, and the same is hereby, directed to be enforced and carried into execution and effect.

Enter.

J. F., *J. G. S.*

53 [Endorsed:] The People, appellants, *vs.* Benjamin Hawker, respondent. Order on remittitur. Copy. W. M. K. Olcott, district attorney, criminal court building, New York city.

54 I, John F. Carroll, clerk of the court of general sessions of the peace, held in and for the city and county of New York, do hereby certify that the annexed is a copy of a bond for costs now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

Given under my hand and attested by the seal of the said court this tenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

{ Seal of New York Courts of Over & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL.

3d vol. R. S., 5th ed., § 74, p. 687.

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55 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
BENJAMIN HAWKER. } Bond for Costs.

Know all men by these presents that we, Benjamin Hawker, principal, of 510 Third Ave., in the city of New York, and John Z. Gifford, surety, of 141 East Fifty-second street, of the same place, are held and firmly bound to the above-named People of the State of New York in the sum of two hundred and fifty dollars, to be paid to the said People of the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 7th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Benjamin Hawker has *been* prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named Benjamin Hawker shall prosecute said appeal to effect and answer all damages and costs if he fail to make said ap-
56 peal good, then this obligation shall be null and void; otherwise the same shall be and remain in full force and virtue.

BENJAMIN HAWKER. [SEAL.]
JOHN Z. GIFFORD. [SEAL.]

Sealed and delivered and taken and acknowledged this 7th day of April, 1897, before me—
SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

Approved by—
JAMES FITZGERALD,
Judge General Sessions.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

John Z. Gifford, the above-named surety, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN Z. GIFFORD.

Sworn to this 7th day of April, A. D. 1897, before me—
SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

Approved, as to form and sufficiency, April 7th, 1897.

W. M. K. OLCOTT, *Dist. Att'y.*

57 [Endorsed:] New York general sessions of the peace. The People of the State of New York against Benjamin Hawker. Bond for costs. Copy. Filed April 7th, 1897.

Endorsed on cover: Case No. 16,628. New York court of general sessions of the peace for the city and county of New York. Term No., 415. Benjamin Hawker, plaintiff in error, *vs.* The People of the State of New York. Filed July 14th, 1897.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

(5129)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 415.

BANJAMIN W. HAWKER,
Plaintiff in error,

against

THE PEOPLE OF THE STATE OF NEW YORK.

Motion to Advance.

The defendants in error respectfully move the court to advance the above entitled cause on the docket and set the same down for hearing at such early day during the present term as will be convenient to the court.

The plaintiff in error was convicted in the Court of General Sessions of the Peace of the City and County of New York, at the September Term, 1896, of the misdemeanor of practicing medicine after having been convicted of a felony, in violation of a statute of the State of New York known as the Public Health Law, which provides that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor."
>
> Chap. 661, Laws of 1893, sec. 153, as amended by chap. 398, Laws of 1895.

The indictment alleged, and it was conceded on the trial that on the 6th day of March, 1878, the plaintiff in error was convicted in the Court of Sessions of the county of Kings, in the State of New York, of the felony of abortion, and was thereupon sentenced to imprisonment in the Kings County Penitentiary for the term of ten years, and that after such conviction, to wit: on the 22d day of February, 1896, he practiced medicine in the City and County of New York, by examining, treating and prescribing for one Dora Hoenig, as a physician.

At the time of the respondent's conviction (in 1878) of the felony of abortion, a conviction for that offense, whether committed by a physician or any other person, rendered the offender liable to a penalty of imprisonment and disfranchisement, as in all cases of conviction for felony; but the fact of a physician having been convicted of abortion or any other felony did not, at that time, of itself, disqualify him from subsequently practicing his profession, or render him liable to prosecution in case he did so; and no attempt was made to exclude convicted felons, *as such*, from the practice of medicine, till the year 1887 (nine years after the respondent's conviction) when the legislature passed an act which provided that—

> "No person shall be licensed or permitted to practice physic or surgery in this state who has been convicted of a felony by any court of competent jurisdiction; and if any person who is or hereafter shall be duly licensed to practice physic or surgery in this state, shall be convicted of a felony, as aforesaid, his or her license to so practice, if any, shall be revoked, by the fact of such conviction having been had. * * * Any person * * * who, after conviction of a felony, as aforesaid, shall attempt to practice physic or surgery in this state * * * shall be deemed guilty of a misdemeanor. * * *

Chap. 647, Laws of 1887, sec. 6.

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In 1893, the statutes regulating the practice of medicine were engrafted into and made a part of the statute called the Public Health Law, enacted that year (chap. 661, Laws of 1893), and the above-quoted provision of the Act of 1887, section 6, was enlarged so as to provide that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine * * * shall be guilty of a misdemeanor. * * *

Chap. 661, Laws of 1873, sec. 153.

And in 1895 the provision was made to apply in terms to persons who, after conviction of a felony actually practiced medicine, as well as those who attempted to do so.

Chap. 398, Laws of 1895 (*supra*).

The plaintiff in error demurred to the indictment upon the grounds—

(1.) That the Act of 1895, upon which the prosecution is based, is not retrospective in its operation, that is to say, does not apply to persons convicted of felonies previous to the time of its passage; and

(2.) That if construed as applying to persons convicted previous to its passage, then the act is, in that respect unconstitutional, as being *ex post facto* and void.

The demurrer was overruled, and on the trial the plaintiff in error admitted that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed.

He thereupon appealed from the judgment of the General Sessions to the Appellate Division of the Supreme Court of the State of New York, and on the 10th day of February, 1897, the Appellate Division reversed the judgment.

The defendants in error then appealed to the Court of Appeals of the State of New York from the judgment of

reversal, and on the 16th day of March, 1897, the Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of conviction; whereupon the plaintiff in error sued out a writ of error for the purpose of bringing the question involved before this court for final adjudication.

This question, briefly stated, is whether the provision of the Public Health Law violated by the plaintiff in error is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder, or a bill of pains and penalties, and thus included in the powers, the exercise of which is forbidden to the several States by the constitution of the United States.

The defendants in error contend that the legislation in question, being manifestly designed for the protection of the public health and safety against the danger, real or anticipated, of permitting convicted felons to practice, or to continue practicing medicine, and being calculated, intended, convenient and appropriate to accomplish that purpose, it must be upheld as a valid and reasonable exercise of the police power, even though its effect be to absolutely prohibit physicians convicted of felonies prior to its enactment from continuing the pursuit of their profession.

The desirability of procuring the final and authoritative settlement of a question of such manifest public concern, is, it is respectfully submitted, a proper ground for the granting of this motion.

Therefore, we submit that cause is shown, under Rule 26, why this case should be advanced.

Notice of this motion has been served on the attorney for the plaintiff in error, and proof of service filed with the Clerk of this Court.

JOHN D. LINDSAY,
Of Counsel for the defendants in error.